

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

MARY J. KANDEL,

Plaintiff,

v.

**CIVIL ACTION NO. 2:04 CV 71
(Maxwell)**

**JO ANNE B. BARNHART,
COMMISSIONER OF
SOCIAL SECURITY,**

Defendant.

ORDER

By Order entered June 2, 2005 (Docket No. 16), the Court referred the cross-motions for summary judgment filed in the above-styled Social Security action to United States Magistrate Judge James E. Seibert, pursuant to 28 U.S.C. § 636(b)(1)(B); Rule 72 of the Federal Rules of Civil Procedure; and Rule 7.02(c) of the Local Rules of Civil Procedure, with directions to consider the same and to submit to the Court proposed findings of fact and a recommendation for disposition.

On January 9, 2006¹, Magistrate Judge Seibert filed his Report And Recommendation (Docket No. 17) wherein the parties were directed, in accordance with 28 U.S.C. §636(b)(1) and Rule 6(e) of the Federal Rules of Civil Procedure, to file any written objections thereto with the Clerk of Court within ten (10) days after being served with a copy of said Report And Recommendation. Magistrate Judge Seibert's Report And Recommendation expressly provided that a failure to timely file objections would result in waiver of the right to appeal from a judgment of this Court based thereon.

¹Although filed on January 9, 2006, Magistrate Judge Seibert's Report And Recommendation was entered by him on January 6, 2006.

On January 16, 2006, the Plaintiff's Objections And Exceptions To Report And Recommendation Of The Magistrate Judge (Docket No. 18) was filed with the Court; on January 18, 2006, the Defendant's Objections To The Magistrate Judge's Report And Recommendation (Docket No. 19) was filed with the Court; and, on January 20, 2006, the Defendant's Response To Plaintiff's Objections And Exceptions To The Report And Recommendation Of The Magistrate Judge (Docket No. 20) was filed with the Court.

Upon consideration of both the Plaintiff's and the Defendant's Objections to Magistrate Seibert's Report And Recommendation, it appears to the Court that neither party has raised any issues that were not thoroughly considered by Magistrate Judge Seibert in his Report And Recommendation. Moreover, the Court, upon an independent *de novo* consideration of all matters now before it, is of the opinion that the Report And Recommendation accurately reflects the law applicable to the facts and circumstances before the Court in this action.

Therefore, it is

ORDERED that Magistrate Judge Seibert's Report And Recommendation (Docket No. 17) be, and is hereby, **ACCEPTED** in whole and that this civil action be disposed of in accordance with the recommendation of the Magistrate Judge. Accordingly,

1. The Plaintiff's Motion For Summary Judgment (Docket No. 11) is **GRANTED, IN PART;**
2. The Defendant's Motion For Summary Judgment (Docket No. 13) is **DENIED;**
3. The Plaintiff's claim is **REMANDED** to the Commissioner of Social Security pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further consideration pursuant to the recommendation contained in the Magistrate Judge's Report And

Recommendation²;

4. The above-styled civil action is **DISMISSED WITH PREJUDICE** and **RETIRED** from the docket of this Court.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, the Clerk of Court is directed to enter a separate Judgment Order reversing the decision of the Defendant and remanding the Plaintiff's claim for a rehearing.

In accordance with Shalala v. Schaefer, 113 S.Ct. 2625 (1993), counsel for the Plaintiff is advised that an application for attorney's fees under the Equal Access to Justice Act (EAJA), if one is to be submitted, must be filed within 90 days from the date of the Judgment Order.

The Clerk of Court is directed to transmit copies of this Order and the Judgment Order to counsel of record.

ENTER: March 22, 2006

/S/ Robert E. Maxwell
United States District Judge

²Magistrate Judge Seibert recommended that the above-styled civil action be remanded to the Commissioner of Social Security for the Administrative Law Judge to consider explicitly and state his reasons for determining whether the Plaintiff satisfies the pertinent listings of Appendix I.